

No. 77-470

Supreme Court, U. S.

FILED

DEC 7 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO.
391, AFFILIATED WITH THE INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Petitioner,

v.

PILOT FREIGHT CARRIERS, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

REPLY TO OPPOSITION BY
RESPONDENT PILOT FREIGHT CARRIERS, INC.
TO THE PETITION FOR CERTIORARI

DAVID PREVIAINT, ESQUIRE
ROBERT M. BAPTISTE, ESQUIRE
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-6945

ANGELO V. ARCADIPANE, ESQUIRE
WILLIAM W. OSBORNE, JR., ESQUIRE
1819 H Street, N.W.
Washington, D.C. 20006
(202) 785-3525

Attorneys for Petitioner

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The following is submitted by Petitioner, Chauffeurs,
Teamsters and Helpers Local Union No. 391, affiliated
with the International Brotherhood of Teamsters, Chauff-
eurs, Warehousemen and Helpers of America, in reply
to the Brief of Respondent Pilot Freight Carriers, Inc.

in Opposition to the Petition herein, pursuant to Rule 24 of the Revised Rules of the Supreme Court.

PRELIMINARY STATEMENT

Ordinarily a reply brief would be unnecessary where, as here, the Respondent Pilot Freight's Opposition to the Petition raises no new arguments pertaining to the appropriateness of granting a writ of certiorari which were not adequately addressed in the Petition itself. However, the Brief in Opposition reflects a number of misstatements of relevant legal principles which should be brought to the Court's attention.

ARGUMENT

1. As Respondent Pilot Freight acknowledges, there is in this case "no material conflict in the evidence." (Opp., 3).¹ Yet, Respondent also contends that this case presents no more than a "factual" dispute (Opp., 2), and that therefore the *Universal Camera* standard of appellate review (*Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)) applied by the court below was proper.² (Opp., 4-6). As shown in the Petition, the standard of review announced in *Universal Camera* is directed only to issues involving the evidentiary support for an agency's findings of fact (Pet., 10-11). Since the evidentiary facts are admittedly not in dispute and the only question in contro-

¹ References to the Petition for Certiorari and to the Opposition to Petition are cited herein as (Pet., —) and (Opp., —), respectively. The Respondent, National Labor Relations Board filed a Memorandum with the Court on December 2, 1977. References to the Board's Memorandum are cited herein as (Mem., —).

² The Board in its Memorandum recognizes that the Fourth Circuit's disagreement with the Board was not over what the facts of this case are, but instead "the difference between the Board and the Court turns . . . on a differing evaluation of the facts of this . . . case". (Mem., 4, emphasis added).

versy is the Board's expert evaluation of undisputed facts in terms of the statutory definition of "supervisor", the more narrow scope of review mandated by this Court in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) is required. (Pet., 8-10; Mem., 4).

For the same reason, Respondent's citation of *Universal Camera* as limiting this Court's review of cases involving mere factual, evidentiary issues is also mistaken. (Opp., 6-7).

2. While Respondent correctly recognizes that the *Hearst* standard of review requires greater deference to an agency's expertise than the *Universal Camera* standard (Opp., 7), its assertion that application of the *Hearst* standard would render the Board's determination of supervisory status under the Act "unassailable" or completely immune from review is plainly incorrect. (Opp., 8-9). According to this Court, an appellate court may properly reject such a determination by the Board under *Hearst* if it lacks either "warrant in the record" or "a reasonable basis in law." (Pet., 8-9). This Court recently applied the *Hearst* standard of review to set aside Board determinations in similar circumstances. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971). Circuit courts have also exercised this authority. See, e.g., *Wichita Eagle & Beacon Publishing Co., Inc. v. NLRB*, 480 F.2d 52, 54-55 (10th Cir. 1973), cert. denied, 416 U.S. 982 (1974).

3. It was surprising to learn that this Court's *Hearst* decision has been overruled. (Opp., 10). Numerous Supreme Court decisions cited in the Petition reflect the continued viability of *Hearst*. However, if there is some reasonable basis for Respondent's assertion that *Hearst* has been overruled, then a significant question of federal law is presented which should be settled and an additional reason exists for granting the writ of certiorari. Rule 19(b) of the Revised Rules of the Supreme Court.

4. By attempting to equate judicial review of Board determinations pertaining to "independent contractor" status with those regarding the status of individuals as "supervisors", Respondent attempts to paper over a legal distinction which is crucial to the Court's proper consideration of this case. (Opp., 10-11). As to the "independent contractor" issue, Congress specifically removed that question from the Board's expertise by mandating that principles of common law agency be applied. *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968). In contrast, Congress of necessity drew upon established Board principles for its definition of "supervisor" S. Rep. No. 105, S. 1126, 80th Cong. 1st Sess. 4 (1947). There is no common law concept of "supervisor". This obviously important distinction is addressed at great length in the Petition so as to make extended discussion herein unnecessary. (Pet., 10). Compare *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, *supra*, and *NLRB v. United Insurance Co.*, *supra*.

The decision of the Second Circuit in *Lorenz Schneider Co., Inc. v. NLRB*, 517 F.2d 445 (2nd Cir. 1975) was, accordingly, miscited by Respondent since it dealt with appellate review of a Board determination regarding the status of individuals as "independent contractors" rather than as "supervisors". (Opp., 11).

5. Finally, nowhere in its Opposition does Respondent address the disagreement among appellate courts on this important question of judicial review. (Pet., 11-12). If the applicability of the *Hearst* standard of review to the issues in this case is indeed as "incredible" as Respondent would have the Court believe (Opp., 9), surely there would be no judicial confusion.

CONCLUSION

As Respondent acknowledges, the rights under the Act of an entire "class of persons" in the transportation industry will be vitally affected by the resolution of this case. (Opp., 1-2). Yet once the misstatements of applicable legal principles are eliminated from its Opposition, Respondent has offered no good reason for the Petition to be denied. The real issue in this case is whether or not the Board's expert determination that the Company's individual dispatchers are "employees" under the Act rather than "supervisors" was given appropriate deference by the Fourth Circuit, as required by this Court's *Hearst* doctrine. We submit that the questions of public policy and administrative procedure presented by this case are critical ones which should be addressed by the Court.

For the foregoing reasons, and those stated in the Petition, we reiterate our request that this Petition be granted.

Respectfully submitted,

DAVID PREVIA, ESQUIRE
ROBERT M. BAPTISTE, ESQUIRE
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
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